BRIEF IN SUPPORT OF PETITION.

I.

OPINION BELOW.

The opinion filed in the Trial Court appears at page 252 of the Record and is not reported. No appellate court filed any opinion.

II.

JURISDICTION.

The judgment on remittitur from the Court of Appeals was entered in the Supreme Court, Nassau County, on May 13, 1942 (R., p. g). Petition for rehearing was entertained by the Court of Appeals and denied June 4, 1942 (R., p. d). Jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code as amended (28 U. S. C., § 344).

III.

SPECIFICATION OF ERRORS TO BE URGED.

All of the errors set forth in the Assignments of Error (Petition, p. 12) will be urged.

IV.

FACTS.

The facts are stated in the Petition (*ante*, pp. 2-6) to which reference is made.

ARGUMENT.

I.

SHANNON HAD PRIMA FACIE TITLE TO THE MONEY PAID TO THE RESPONDENTS AS A MATTER OF LAW.

Possession of currency denotes ownership thereof in the possessor by presumption of law.

Collins v. *Gilbert*, 94 U. S. 753, 760;
Goshen Nat'l Bank v. *Bingham*, 118 N. Y. 349, 355;

Barlow v. *Myers,* 24 Hun (N. Y.) 286, 289;
Spraights v. *Hawley,* 39 N. Y. 441, 446;
Whiton v. *Snyder,* 88 N. Y. 299, 302;
Perkins v. *Guaranty Trust Co.,* 274 N. Y. 250, 261.

Shannon had possession and control of his bankroll.

The Trial Court held (R. 252): "* * * Shannon paid to John Cavanagh, etc."

The advance from McClanahan was made by three checks payable to the order of Frank Shannon (R. 168, 246, 247).

The checks were endorsed by Shannon (R. 246, 247) and deposited in a joint account in the names of Virginia Shannon, his wife (R. 153) and Walter Faust, his cashier.

His winnings in his cashier's hands at the track resulting from his own operations as a bookmaker were used to make the payments sued for (R. 67, 74). Surplus winnings were deposited in the joint bank account (R. 153).

THE PETITIONER HAS BEEN DENIED THE PROTECTION OF THE ANTI-GAMBLING LAWS.

During the period involved in this suit the Constitution of the State of New York provided in Article I, § 9:

> "9. * * *; nor shall any lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section."

It was also provided by § 991 of the Penal Law of the State:

> "All wagers, bets or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful."

and by § 992 of the Penal Law:

> "All contracts for or on account of any money or property, or thing in action wagered, bet or staked, as provided in the preceding section, shall be void."

It was provided by § 993 of the Penal Law:

> "All things in action, judgments, mortgages, conveyances, and every other security whatsoever, given or executed, by any person, where the whole or any part of the consideration of the same shall be for any money or other valuable thing won by playing at any game whatsoever, or won by betting on the hands or sides of such as do play at any game, or where the same shall be made for the purpose of such gaming or betting aforesaid, or lent or advanced at the time and place of such play, to any person so gaming or betting aforesaid, or to any person who during such play, shall play or bet, shall be utterly void, except where such securities, conveyances or mortgages shall affect any real estate, when the same shall be void as to the grantee therein, so far only as hereinafter declared.
>
> When any securities, mortgages or other conveyances, executed for the whole or part of any consideration specified in the preceding paragraph shall affect any real estate, they shall inure for the sole benefit of such person as would be entitled to the said real estate, if the grantor or person incumbering the same, had died, immediately upon the execution of such instrument,

> and shall be deemed to be taken and held to and for the use of the person who would be so entitled. All grants, covenants and conveyances, for preventing such real estate from coming to, or devolving upon, the person hereby intended to enjoy the same as aforesaid, or in any way incumbering or charging the same, so as to prevent such person from enjoying the same fully and entirely, shall be deemed fraudulent and void."

The bankrolling contract between Shannon and his financier created a "thing in action."

> *Bushnell* v. *Kennedy,* 76 U. S. 387, 392;
> *Blodgett* v. *Silberman,* 277 U. S. 1, 9, 10;
> *Castle* v. *Castle* (C. C. A. 9), 267 Fed. 521, 523;
> *Nudelman* v. *Insulite Co.* (1937), 252 App. Div. (N. Y.) 642, 644.

The terms of § 993 are broad and cover intangibles as well as tangibles.

That same section was construed to render void a note given by a borrower who advanced the borrowed money to "bankroll" a bookmaker in *Chapin* v. *Austin,* 165 Misc. 414 (printed as Appendix B, *post*).

This statute is a valid law of the land and as such must be enforced. Failure to enforce it has deprived the petitioner of a just recovery.

In its opinion (R. 252), the Trial Court said:

> "The plaintiff leans heavily upon the case of *Chapin* v. *Austin,* 165 Misc. 414, decided by this Court,"

and then held the case was not in point but said nothing about § 993, Penal Law, which was the basis of the decision.

The general law of the land also renders an illegal contract ineffective against legal rights.

> *Armstrong* v. *Toler,* 11 Wheat. (24 U. S.) 258.

That which is void for reasons of public policy cannot be made valid by indirection and the respondents be thus permitted to make out a defense with the affirmative aid of a void contract.

The Court of Appeals of New York stated the law in *Sabine* v. *Paine,* 223 N. Y. 401, at page 404:

> "An instrument which a statute, expressly or through necessary implication, declares void. strictly speaking, is a *simulacrum* only. It is without legal efficacy. It cannot obligate a party or support a right."

A *chose in action* can rank no higher than the evidence adduced to support it. Oral evidence of an obligation under a void contract does not rank higher than a written instrument as evidence thereof.

Any contract or *chose in action* declared by statute to be "utterly void" must be treated by the Courts as being non-existent in fact and any evidence to the contrary is incompetent to establish it. Otherwise the express provisions of the statute are ignored.

The basis of the decision of the Trial Court was ownership of the money in another. The only evidence offered to support the finding is of a contract which the Penal Law of the State of New York declares is null and void.

Without such evidence there would have been nothing in the Record to support the Court's decision.

The respondent Club is not entitled to have an exception made in its favor. It concedes that it allowed bookmaking to flourish at its track in 1934, 1935 and 1936. Counsel for the Club conceded (R. 56):

> "Mr. Carr: I will concede we knew during 1934 and 1935 and 1936 that Frank Shannon was at the track on certain days offering to accept wagers from the public, accepting them, recording them on the sheet, and in the event that the bettor who made the bet with him won, at the odds Frank Shannon offered, he would then pay the bettor off in cash.
>
> The Court: That was done with the knowledge of the defendant?
>
> Mr. Carr: That was done with the knowledge of the defendant."

and further (R. 195):

> "The Court: * * * bets were being made down there, wagers were being placed with bookmakers; that that was done openly; that the racing association knew it; that it was illegal; that nothing was done to stop it; in other words, what happened here is the racing association relied on the statute which apparently they believed made the only penalty for the recovery of money wagered in a civil action. Have I stated it correctly?
>
> Mr. Carr: You have stated it correctly."

The respondent Club had the statutory power to prevent bookmaking at its track. Since 1926 all Racing Associations had the power (Laws 1926, Chap. 440; Unconsolidated Laws, § 1134) to appoint

> "* * * five or more special policemen * * * who * * * shall be police officers * * * whose duty * * * shall be to preserve order * * * and * * * to prevent all violations of law with reference to * * * bookmaking * * * and to arrest any and all persons violating such provisions * * *."

The respondent Club *did not exercise* that appointive power (R. 98, 99).

It thus deliberately violated the spirit and letter of the Constitution and was directly responsible for the conditions (R. 167) which induced the illegal financing contract (R. 183) upon which it relies to defeat this action.

The clear purpose of the laws to carry out the public policy to protect society against organized gambling has been frustrated and the protection intended to be afforded this petitioner has been unjustifiably withheld.

THE OPINION BELOW IGNORED THE REAL ISSUE OF LAW PRESENTED IN THIS CASE.

The opinion filed in this action is that of the Trial Court. It is not officially reported but is printed at pages 252-255 of the Record.

The Appellate Division and the Court of Appeals both concurred without further opinion.

The opinion finds (R. 252) that:

> "Shannon paid to John Cavanagh, as agent of the defendant club, the sum of $100 as contribution to stakes and purses, for each day that six races were run at the track, and $110 for each day that seven races were run, during the seasons of 1934, 1935 and 1936. During that entire period Shannon was insolvent."

Consideration of the questions involved in this case must be based upon two established facts:

1—Shannon possessed the currency paid as contributions.

2—Shannon was insolvent when he made the payments.

With no other controlling facts, the contributions would be recoverable for Shannon's creditors under § 273 of the Debtor and Creditor Law which provides:

> "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration."

The Court then proceeds to deny recovery upon the findings that Shannon did not own the currency (R. 253) but that it belonged to his "bankroller" McClanahan.

The finding that Shannon did not own the money could not have been made without receiving, over petitioner's objection evidence of the alleged oral "bankrolling" contract (R. 212).

Such contracts are declared to be void under § 993 of the Penal Law (*ante*, p. 16).

> *Chapin* v. *Austin*, 165 Misc. 414 (Appendix B, *post*, p. 27).

The "bank-roller" could not have recovered his advances—must less winnings—from the gambler because the law expressly refuses to recognize any rights under his contract.

The respondent Club stands in no better position. It cannot attack the title of Shannon to the money by showing that it belonged to another by virtue of a contract which, by statute law, is null and void. It gave no consideration for the money it received from Shannon (R. 139).

The finding that Shannon was the "agent" in making the payments necessarily involves giving ef-

fect to the contract of bankrolling, which is wholly void under the statute. Even the most convincing documentary evidence of the existence of the contract cannot overcome its invalidity. The daily withdrawal of $40 that Shannon made from the bankroll throughout the season for his personal use—which the respondents claim was "salary"—could have no effect upon the illegality of the contract. Shannon could not have defended a prosecution for gambling upon the plea that he was betting as an "agent."

Aside from the void contract in question, there is no other evidence of agency; quite the contrary.

McClanahan's testimony (R. 227):

> "Q. You have never been a bookmaker in New York State, have you? A. No, I have not."

and Shannon's testimony (R. 168):

> "My name was on the slate that I held up."

stand uncontradicted.

The statement by the Court (R. 254):

> "The claim of illegality should not be permitted as the cloak for injustice."

which seems to have been the motivating factor in the decision is without basis in law. No "injustice" could result to McClanahan—he got his $30,000 back; the respondent Club gave no consideration for Shannon's payments; it would be illegal to give Shannon's own winnings to McClanahan under his financing contract—and in preference to Shannon's creditors.

Throughout his opinion the Trial Court does not support his failure to enforce § 993 of the Penal Law with any authorities or reasoning. He just ignored that controlling law of the land and rendered his decision in spite of it.

It clearly results that the state courts have illegally discriminated against the petitioner and in favor of the respondents by failing to enforce the positive injunction of § 993 of the Penal Law when a racing club is involved, although it is primarily responsible for the gambling conditions at its track and clearly benefited therefrom.

The State Courts have thus ignored a basic principle of general law that has been specifically confirmed by statute, whereby the petitioner has been denied the protection of the law and the writ should therefore be granted.

Armour & Company v. *Fort Morgan S. S. Co.*, 270 U. S. 253, 257.

Respectfully submitted,

HORACE M. GRAY,
Attorney for Petitioner.

HORACE M. GRAY,
CHARLES E. WYTHE,
of Counsel.

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